STATE OF MICHIGAN

COURT OF APPEALS

PULTE LAND COMPANY, LLC and MARGARET BRECHTING,

Plaintiffs-Appellees/Cross-Appellants,

v

ALPINE TOWNSHIP,

Defendant,

and

CHRIS BRECHTING,

Intervening Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
September 12, 2006

No. 259759
Kent Circuit Court
LC No. 02-008377-CZ

PULTE LAND COMPANY, LLC and MARGARET BRECHTING,

Plaintiffs-Appellees,

v

ALPINE TOWNSHIP,

Defendant-Appellee,

and

CHRIS BRECHTING,

Intervening Defendant-Appellant.

No. 261199
Kent Circuit Court
LC No. 02-008377-CZ

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

In these consolidated appeals, intervening defendant appeals as of right an order granting rezoning of property owned by plaintiffs in Alpine Township and an order awarding costs to plaintiff. Plaintiffs cross-appeal the order granting rezoning. Although we substantially agree with the trial court's resolution of this case, we vacate the order and remand for entry of a corrected order.

The property at issue in this case is 52 acres of historically agricultural property located at the corner of 6 Mile Road and M-37 in Alpine Township, Kent County, Michigan. The property is located within, but at the extreme eastern edge of, a unique geographic region known as the "fruit ridge." The property is also located within, but at the extreme western edge of, sewer and water utility districts. The property had "always" been used for farming, although by the time of trial most of it had been disused for some time. Some of the surrounding land continues to be used for farming, and other surrounding areas are commercial.

Plaintiff Margaret Brechting ("Ms. Brechting") acquired the property in 1967, when she and her husband paid her in-laws $5,000 on a land contract. The property was intended as an inheritance: the money was paid only to avoid inheritance tax, and Ms. Brechting's mother-in-law retained a life estate. The Brechtings were not farmers and did not intend to farm the property. Intervening defendant's parents received a Centennial Farm from the same in-laws. Ms. Brechting's husband and mother-in-law both died in 1993. By that time, Ms. Brechting had been renting the property to her nephew, Martin Brechting, for at least six years in exchange for enough money to pay the property taxes. In 1999, she sought to sell the property for development, explaining that no one wanted to purchase it for farming. Plaintiff Pulte Land Company LLC ("Pulte") eventually agreed to purchase the property for approximately a million dollars for the purpose of constructing a residential development.

At the time, Pulte was aware that the property was zoned for agriculture. However, Alpine Township's master plan and future use plan showed that the area was planned for medium density residential development, consistent with Pulte's development plans. On August 20, 2001, Pulte applied to Alpine Township to rezone the property from agricultural to Open Space Neighborhood-Planned Unit Development ("OSN-PUD"), consistent with the township's master plan. The Alpine Township Planning Commission and the Alpine Township Board approved the rezoning. However, a referendum was held during the 2002 election, on the basis of which the rezoning ordinance was rejected, resulting in the property remaining zoned for agriculture. Pulte then asked the Zoning Board of Appeals for a variance, which was denied. Plaintiffs then brought this suit against Alpine Township, alleging violation of substantive due process, inverse condemnation, and violation of equal protection; they sought an injunction against Alpine Township interfering with the use of the property for single family homes. Intervening defendant moved to intervene, noting that he had been the motivating force behind the referendum and arguing that he had a personal interest in the matter "both as a nearby property owner whose property rights will be affected" and "as a citizen of the Township with an interest in ensuring that his initiative rights are meaningful and effective." Intervening defendant opined that the township would not adequately represent his interests, and he argued that rezoning would affect his interest "in his own property" across the road from the proposed development. On that basis, the trial court granted the motion to intervene.

During the pendency of the principal litigation, plaintiffs and Alpine Township resolved their differences in an agreement that, in significant part, permitted plaintiffs' proposed use of the property. The trial court entered a partial consent judgment reflecting that agreement. The consent judgment explicitly stated that intervening defendant was not a party to the agreement and that it would become null and void if the continuing litigation with intervening defendant resulted in a final judgment incompatible with the terms of the consent judgment. The matter continued to trial on intervening defendant's case. After a three-day bench trial, the trial court entered an opinion and order finding that the zoning ordinance, as applied to the property, constituted a "taking" under the balancing test set forth in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). The parties appealed that opinion and order in Docket No. 259759. Plaintiffs subsequently requested costs from intervening defendant, which the trial court granted. Intervening defendant appealed the grant of costs in Docket No. 261199. This Court consolidated the appeals.

We first note our agreement with both parties that the trial court's remedy in this case, a judicial order granting rezoning of the property, violates the doctrine of separation of powers. *Schwartz v City of Flint*, 426 Mich 295, 306-310; 395 NW2d 678 (1986). Therefore, the portion of the order rezoning the property must be vacated. However, there exists no prohibition against the trial court entering a modified order achieving the same functional result by enjoining the township from interfering with the development of the property. *Id*., 329.

Intervening defendant argues that the consent judgment itself is impermissible because it achieves a result contrary to the referendum, thereby allegedly thwarting the will of the citizenry. We reject this contention as contrary to both precedent and logic. A consent judgment in which a township agrees to grant a use variance is entirely permissible and is construed as a contract. *Inverness Mobile Home Community, Ltd v Bedford Twp*, 263 Mich App 241, 248; 687 NW2d 869 (2004). The only limitation is whether entering into such a contract "constitutes an act that impermissibly contracted away the legislative powers of a future governing body." *Id*. Intervening defendant does not argue that the consent judgment here contains any legislative requirements to be imposed on future boards, nor do we perceive any such requirements. Rather, intervening defendant urges us to adopt a special rule for situations where there has been a referendum contrary to the consent judgment.

Legislative acts of municipalities are afforded a presumption of validity, and the courts may not disturb them unless those acts are found arbitrary or unreasonable. *Kropf v City of Sterling Heights*, 391 Mich 139, 161-162; 215 NW2d 179 (1974). A referendum is simply another way to create such municipal legislation. *Stadle v Battle Creek Twp*, 346 Mich 64, 69-70; 77 NW2d 329 (1956). The fact that the municipal legislation was arrived at by a referendum vote does not immunize it from an attack on the basis of its constitutionality or reasonableness. *Newman Equities v Charter Twp of Meridian*, 474 Mich 911; 705 NW2d 111 (2005); *Poirier v Grand Blanc Twp*, 167 Mich App 770, 777; 423 NW2d 351 (1988). The fact that a majority vote can be obtained on a given subject does not grant a municipality the absolute right to do anything it wishes. The consent judgment was entered into by township officers who were authorized to act and to conclude that it was in the township's best interests to compromise potentially disruptive litigation.

Intervening defendant next argues that the trial court erred by failing to afford the proper level of deference to the zoning board of appeals' denial of the requested use variance.

Specifically, intervening defendant argues that the trial court erred in relying on *Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197; 651 NW2d 464 (2002). We disagree. The trial court in this case was not engaged in a review of the actions of a zoning board of appeals, as was the trial court in *Janssen*. The analysis in *Janssen* regarding the standard of review applicable to a ZBA decision has no relevance here. *Id*., 198-201. The trial court here was analyzing the economic effect the zoning ordinance has on the property, and it relied on *Janssen* only for the statement of the applicable legal analysis: "'[w]hether property used in trade or business or held for the production of income can reasonably be used for a purpose consistent with existing zoning will, no doubt, ordinarily turn on whether a reasonable return can be derived from the property as then zoned.'" *Janssen*, *supra* at 201-202, quoting *Puritan-Greenfield Improvement Ass'n v Leo*, 7 Mich App 659, 673-674; 153 NW2d 162 (1967). The trial court's reliance on *Janssen* was only for a correct statement of the applicable law.

Intervening defendant's primary argument on appeal is that the trial court erred in finding a taking. We disagree.

There are three circumstances under which "the government may effectively 'take' a person's property by overburdening that property with regulations." *K&K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576-577; 575 NW2d 531 (1998), cert den 525 US 819; 119 S Ct 60; 142 L Ed 2d 47 (1998). The first, where the regulation is irrational, is argued by plaintiffs on cross appeal, *infra*. The second, where the owner is denied *all* economical uses of the property, also known as "categorical taking," cannot be argued by plaintiffs in light of their concession at trial that they have no basis for such a claim. Finally, a taking may be "recognized on the basis of the application of the traditional 'balancing test' established in *Penn Central*[, *supra*]." *K&K Constr*, *supra* at 577. Under this test, "a reviewing court must engage in an "ad hoc, factual inquir[y]," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *Id*., citing *Penn Central*, *supra* at 124. "We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

Intervening defendant first argues that plaintiffs were aware of the property's agricultural zoning, so it is legally impossible for them to have had any investment-backed expectations. We disagree. Our Supreme Court has explicitly stated that "one who purchases with knowledge of zoning restrictions may nonetheless be heard to challenge the restrictions' constitutionality." *Kropf*, *supra* at 152. Intervening defendant argues that this latter point has been implicitly but necessarily overruled by our Supreme Court's more recent case of *Adams Outdoor Advertising v City of East Lansing*, 463 Mich 17; 614 NW2d 634 (2000), cert den 532 US 920; 121 S Ct 1356; 149 L Ed 2d 286 (2001). We disagree. *Adams* was not a zoning case, and our Supreme Court's decision was based on the well-established holding that a property owner cannot *create* a taking by artificially splitting property or otherwise considering a portion of the property apart from the whole. *Id*., 25-26. See also, *Bevan v Brandon Twp*, 438 Mich 385, 395-397; 475 NW2d 37 (1991), cert den 502 US 1060; 112 S Ct 941; 117 L Ed 2d 111 (1992).

The *Adams* Court noted as an aside that the plaintiff had been aware of the sign code and therefore "could have had no reasonable expectation that it could maintain the signs at the rooftop locations after the date designated in the code." *Adams*, *supra* at 27. However, this

statement is in the context of the *Adams* Court's conclusion that "even before enactment of the sign code, the leases at issue did not include an absolute right to display signs on the rooftops." *Id*., 25. The statement was not made in the context of the Court's analysis of whether there had been interference with an investment-backed expectation. Rather, "any interference would be limited because the rooftop is only a small portion of the lessors' property and because they never had an *absolute* right to display signs on the rooftop." *Id*., 26 (emphasis in original). *Adams* thus held that a municipality may without effectuating a "taking" exercise its police power to forbid something plaintiff never had a right to and affects only a small portion of the property anyway, especially where the plaintiff was aware of the regulation. In any event, a land use regulation may initially be reasonable but become unreasonable over time, so a later property owner should always have a right to challenge it – including on the basis of interference with investment-backed expectations – when it does become unreasonable, even if the property owner was aware of it when he or she purchased the land. *Palazzolo v Rhode Island*, 533 US 606, 626-628; 121 S Ct 2448; 150 L Ed 2d 592 (2001).

Although "there is no set formula for determining when a taking has occurred under" the *Penn Central* balancing test, the inquiry minimally "'requires at least a comparison of the value removed with the value that remains.'" *K&K Constr*, *supra* at 588, quoting *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37 (1991). On the other hand, the mere fact that the property is zoned for a less profitable use, standing alone, is insufficient to establish a taking under this test. *Dorman v Clinton Twp*, 269 Mich App 638, 647; 714 NW2d 350 (2006). The United States Supreme Court explained that all of its regulatory takings tests for the various circumstances share a common theme: "each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle v Chevron USA Inc*, 544 US 528, 539; 125 S Ct 2074; 161 L Ed 2d 876 (2005). In particular, "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id*., 540. The United States Supreme Court admitted that it "quite simply[] has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, *supra* at 124.

The first significant factor to consider is "the character of the government's action." This would be most significant if the government physically invaded the property, which it did not do here. Rather, it imposed a zoning restriction that limits the uses to which the property may be put. It does not eliminate *all* uses. However, there was extensive and undisputed expert testimony below that the zoning ordinance is not the entire story: the zoning ordinance and the township's master plan must be considered together to determine what is legal to do today and what the township's policy is for what may be done tomorrow. Moreover, Alpine Township's master plan was unusually well-updated and entailed significant public involvement. The Alpine Township master plan had, in every incarnation thereof, reflected an overall plan to address future development not by precluding it entirely, but by containing and directing it into specified areas, including the property at issue in this case. Alpine Township therefore planned for growth in a controlled manner, but would not generally rezone property automatically in the absence of a request.

Intervening defendant argues that one cannot save farmland by destroying it, especially where developing the property here will indisputably increase development pressure on neighboring farms. However, the proofs indicate that the surrounding properties are not within any utility districts, and there is no plan for future extension of those services. Further, the surrounding properties, in contrast to the property at issue here, are not and have never been part of the master plan for controlled development. Finally, intervening defendant's argument presumes that there will never be any demand for growth in Alpine Township. This is inconsistent with intervening defendant's concern about *general* development pressure in the form of urban sprawl emanating from Grand Rapids. Logically, if Alpine Township is under increasing development pressure as a whole, the overwhelming likelihood is that something will eventually have to give. The evidence presented indicates that channeling development onto the property here was a careful plan by Alpine Township, with a great deal of public involvement, to control the inevitable. The facts of the case therefore strongly suggest that the zoning ordinance serves a rational and legitimate purpose, but that in the long term retaining it would serve to *frustrate* the public good rather than serve it. Therefore, in tandem with the long range intent of the master plan for development, the "character of the government action" favors plaintiffs.

The second relevant factor is the value of the property as it is zoned compared to the value of the property under the proposed zoning. None of the experts below provided any comparative valuations of the property both as zoned and as proposed. However, in the aggregate it appears that the property is worth between $156,000 and $266,000 zoned for agriculture, and it can be made to yield approximately $20,000 a year. In contrast, most of the purchase offers Ms. Brechting received for development were in the vicinity of a million dollars. Martin Brechting opined that the property was at most worth $3,000 an acre, and Pulte actually paid between $17,153 and $16,639 an acre for it, which was "probably on the low end" of its worth. Although a "diminution in property value, standing alone, [cannot] establish a 'taking,'" *Penn Central*, *supra* at 131, the evidence clearly shows that the property is worth significantly more when zoned for residential development than when zoned for agriculture.

The final significant consideration is "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, *supra* at 124, citing *Goldblatt v Town of Hempstead, NY*, 369 US 590, 594; 82 S Ct 987; 8 L Ed 2d 130 (1962).[1] Intervening defendant primarily relies on the arguments that Pulte had no reasonable expectations given their awareness of the zoning ordinance, and Ms. Brechting had no investment to speak of given the $5,000 she paid and the $500,000 she has already received.[2] Both arguments are superficial. The proposed zoning is consistent with the township's master plan, which the township board relied on heavily as a general matter and which Pulte was also aware of when it purchased the property. Given the long-established plan by the community as a whole to permit development of the property, as reflected by a document that was to be given considerable deference by the

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[1] The term "investment-backed expectation" does not actually appear in *Goldblatt*.

[2] The purchase proceeded in two parts: Ms. Brechting transferred approximately half of the property immediately for half of the money, and Pulte committed to purchasing the other half at a future date.

community, Pulte would have been entirely reasonable in expecting the property to be rezoned for development upon request. Ms. Brechting is not a sophisticated businessperson, nor is she a farmer, nor is she a developer. However, the evidence suggests that her payment of $5,000[3] on a land contract for the property is not as dispositive as intervening defendant argues. She essentially received the property as an inheritance that she and her husband could use for their support after her in-laws' deaths. Given Ms. Brechting's testimony that no one indicated to her an interest in purchasing the property as a farm, the trial court's finding that the zoning ordinance interferes with her investment-backed expectations is not clearly erroneous. Thus, the trial court did not commit clear error in reaching the factual conclusion that the "balancing test" factors, when viewed in the aggregate, weigh sufficiently in plaintiffs' favor to make the zoning ordinance a "taking."

Intervening defendant next argues that the trial court abused its discretion in awarding costs because of the public question involved in this case. Even if we were to presume that there was a public question involved, we disagree. This Court generally reviews a trial court's award of costs for an abuse of discretion, but any preliminary questions of law, such as what constitutes a permissible cost or other issues of statutory construction, are reviewed de novo. *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, 269 Mich App 25, 106; 709 NW2d 174 (2005). We have observed that "Michigan courts frequently refuse to award costs when cases involve public questions." *House Speaker v Governor*, 195 Mich App 376, 396; 491 NW2d 832 (1992), rev'd on other grounds 443 Mich 560 (1993). It is generally not an abuse of the trial court's discretion to decline to award costs on that basis. *Id*. We emphasize that a trial court does not *abuse its discretion* by declining to award costs because a public question is involved. *Village Green of Lansing v Board of Water and Light*, 145 Mich App 379, 395; 377 NW2d 401 (1985). Logically, this means a trial court *has* the discretion to impose costs notwithstanding a public question, in an appropriate situation. "While we do frequently refuse to award costs in cases involving pubic questions, this is hardly a "rule of law" such that failure to adhere to it constitutes an abuse of discretion." *Id*.

Here, intervening defendant sought to intervene in the case on the basis of an alleged *personal* injury he would suffer if plaintiffs obtained rezoning. Intervening defendant relies on *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001), where we recognized the right of property owners, both abutting and in the general vicinity, to intervene in a zoning case where *their interests* may not be adequately represented by the municipality. However, intervening defendant did not present *any* proofs or argument in support of his own personal injury, but rather argued largely on the basis of the harm that would befall the community *in general* should plaintiffs' proposed development take place. Indeed, intervening defendant did not present any argument showing that he had a legally protected

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[3] We note that $5,000 in the year 1967 could be computed as being worth anywhere between $23,478.44 and $74,988.59 in the year 2005, depending on the method used for comparison. These values were obtained from the Economic History Association's "What is the Relative Value?" dollar value comparison calculator online at <http://eh.net/hmit/compare/>. Further, the property was encumbered by Ms. Brechting's mother-in-law's life estate, which can be viewed as lessening its value or increasing the compensation actually paid.

interest that would "be detrimentally affected in a manner different from the citizenry at large." *Moses Inc v SEMCOG*, 270 Mich App 401, 414; ___ NW2d ___ (2006). Where intervening defendant wholly failed to present any proofs or argument in support of the basis for his intervention, we cannot conclude that the trial court abused its discretion in awarding costs.

Intervening defendant finally argues that the costs awarded were excessive as a matter of law. We disagree. Under MCL 600.2164, "an award of reasonable expert witness fees, as determined by the trial court, is mandatory." *Hartland Twp v Kucykowicz*, 189 Mich App 591, 599; 474 NW2d 306 (1991). Services properly compensated include "court time and the time required to prepare for their testimony as experts," but not "'conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position.'" *Id.*, 107-108, quoting *City of Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987). Intervening defendant argues that time spent sitting in court while waiting to testify is, by definition, consultation time.

Intervening defendant relies entirely on an unpublished opinion of this Court in which we merely found no abuse of discretion in a trial court's factual finding that, in that case, certain expert time that had been invoiced as "court time" had actually been spent in consultation. *Doyle v Archbold Ladder Co*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 2002 (Docket No. 227092), slip op at 4-5. *Doyle* is not binding precedent. MCR 7.215(C)(1). Even if it was, nothing in that opinion can be construed as establishing a rule that time spent waiting to testify is automatically consultation time. Intervening defendant advances no evidence suggesting that, as in *Doyle*, the experts' challenged time was actually being used for consultation. Intervening defendant does not assert any other basis for the award of costs being excessive. As discussed, experts may be compensated for "court time" and "preparation time." We see no indication that the trial court made any factual errors or committed an abuse of discretion in imposing the award of costs.

In light of our resolution of the above issues, plaintiffs could not derive any further practical benefit even if we were to conclude that the trial court should not have dismissed their substantive due process or equal protection claims, and at this point whether intervening defendant had or has standing is moot. We therefore decline to consider those issues raised on cross-appeal.

The trial court's order awarding costs to plaintiffs is affirmed. We agree in substance with the trial court's resolution of the underlying case. However, because the order granting re-zoning violates the doctrine of separation of powers, we vacate it, and we remand the matter to the trial court to enter a suitable order consistent with our opinion.

/s/ Alton T. Davis
/s/ David H. Sawyer